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No. 04-1253

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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LORENA ACKERMAN, *et al.*,

Petitioners,

v.

TRACY EDWARDS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
THIRD APPELLATE DISTRICT

BRIEF IN OPPOSITION

DAVID J. RAPPORT
RAPPORT & MARSTON
405 W. Perkins Street
P.O. Box 488
Ukiah, CA 95482
(707) 462-6846

Attorneys for Respondents

193914

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondents Tracy Edwards *et al.* ("Tribal Council"), respectfully oppose, and urge this Court to summarily deny, the petition for writ of certiorari ("Petition") filed by petitioners Lorena Ackerman *et al.* ("petitioners"). The Petition is based on the argument that Public Law 83-280, 28 U.S.C. § 1360 ("PL-280"), granted to the courts of the State of California jurisdiction over claims for injunctive relief against Indian tribes and their tribal officials. There is no uncertainty in state or federal courts concerning this question. The issues raised in the Petition were settled long ago by this Courts's decisions in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) ("*Martinez*") and *Bryan v. Itasca County,* 426 U.S. 373 (1976) ("*Bryan*"). The Tribal Council has found no federal or state court decision that has ruled in favor of the position argued by petitioners, and petitioners cite to none. Petitioners, moreover, do not even argue that the Petition meets any of the criteria set forth for the granting of petitions for certiorari to this Court. Sup. Ct. R. 10(a)-(c). The only conflict between court decisions to which petitioners cite is an alleged conflict between decisions of courts of appeal of the State of California, a conflict that is not among those recognized as an appropriate basis for the granting of a petition for writ of certiorari. That alleged conflict, moreover, does not exist.

CORRECTIONS AND ADDITIONS TO PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete and cites as facts allegations that were never made part of any of the factual findings of the lower courts in this case. The Tribal Council, therefore, will set forth its own Statement of the Case and correct certain statements included in petitioners' statement of the case.

The court of appeal accurately and concisely set forth the relevant facts and proceedings in this case in its opinion. *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 948-950 (2004); Appendix to Petition ("Appendix"), pp. 2a-6a. For the purposes of evaluating the Petition, however, several facts deserve emphasis.

Petitioners challenge Redding Rancheria Tribal Resolution 014-04-01-03 ("Resolution"), which prescribes the hearing procedures for reconsideration of a member's enrollment in the Redding Rancheria ("Tribe"). Petitioners claim that the Resolution violates their right to due process by placing the burden of proof on the tribal member to establish that the member qualifies for membership in the Tribe. 121 Cal. App. 4th at 948, Appendix, pp.1a-2a.

The burden of proof, however, was established in a 1994 amendment to the Tribe's Enrollment Procedures Act ("EPA"). 121 Cal. App. 4th at 949, Appendix, p. 3a. The Resolution did not alter the burden of proof requirement as established in the EPA. 121 Cal. App. 4th at 950, Appendix, p. 5a. Petitioners did not challenge the EPA. C.T. 7-8.[1]

Prior to the adoption of the Resolution, the EPA did not require a formal hearing on a reconsideration of a member's enrollment in the Tribe. Rather, it required the Tribal Council to consider all relevant evidence in conducting that reconsideration, "but the relevancy, weight, and sufficiency of such evidence shall be determined by the . . . Council." 121 Cal. App. 4th at 949, Appendix, p. 3a.

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[1] All references to "C.T." refer to the Clerk's Transcript filed with the court of appeal on October 29, 2003. The numbers following C.T. refer to the page number in the transcript.

The Resolution requires a formal hearing presided over by a hearing officer, who must be an experienced and impartial attorney. The hearing officer is empowered to decide issues of law, including petitioners' due process challenge. 121 Cal. App. 4th at 950, Appendix, pp. 4a-5a. At the time of the trial court proceedings, the Tribal Council and petitioners had agreed on a briefing schedule for submitting this issue to the hearing officer. *See* C.T. 72, &22. *See also* Ex. E.[2]

In their petition for writ of mandate filed in the Superior Court for Shasta County, California, petitioners characterized their claims as being against all seven members of the Tribal Council in their individual and official capacities. However, the Resolution was adopted by the Tribal Council, as the Tribe's governing body. The petitioners' action challenges an enactment of tribal law and is not directed at the conduct of any single member of the Tribal Council or at any action taken in an individual capacity. This is clear from the fact that all seven members were named, even though the measure passed by a four to three vote. C.T. 5.

In response to the petition for writ of mandate, the Tribal Council filed a motion to quash service of summons, motion to dismiss, and demurrer. The Tribal Council argued the trial court lacked both personal and subject matter jurisdiction over the Tribal Council and the Tribe. 121 Cal. App. 4th at 950, Appendix, p. 5a.

The trial court granted the Tribal Council's motion to quash service of summons based on a lack of jurisdiction.

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[2] All references to exhibits are to exhibits attached to the Declaration of Tracy Edwards ("Edwards Declaration"), beginning at C.T. 68.

The court found the Tribal Council made a sufficient showing of entitlement to sovereign immunity. 121 Cal. App. 4th at 950, Appendix, p. 5a.

Petitioners appealed the ruling of the Superior Court to the California Court of Appeals for the Third Appellate District.121 Cal. App. 4th at 948, Appendix, p. 2a.

The Court of Appeal affirmed the decision of the Superior Court, ruling that: (1) the Indian Civil Rights Act does not impliedly authorize actions for declaratory or injunctive relief against either a tribe or its officers, citing *Martinez*, 121 Cal. App. 4th at 953, Appendix, pp. 9a-10a.; (2) the courts of California do not have jurisdiction over disputes between tribal members and tribes through Public Law 280, 121 Cal. App. 4th at 954, Appendix, p. 11a.; (3) neither the ICRA nor the Tribe's Constitution create a private cause of action, and petitioners could not, therefore, invoke the *Ex Parte Young,* 209 U.S. 123 (1908) ("*Ex Parte Young*") exception or any other exception to the Rancheria's sovereign immunity. 121 Cal. App. 4th at 954-55, Appendix, pp. 11a-13a.

As a result of its ruling on the jurisdictional issue, the court of appeal found it unnecessary to address the substance of petitioners' due process arguments. 121 Cal. App. 4th at 955, fn. 3, Appendix, p. 13a, fn. 3.

Petitioners filed a petition for review with the Supreme Court of the State of California. On December 15, 2004, the court summarily denied that petition. *Ackerman v. Edwards*, 2004 Cal. LEXIS 12011 (2004).

Pursuant to Sup. Ct. R. 15(2), the Tribal Council is compelled to correct certain statements made in petitioners'

statement of the case. Petitioners make reference to a "theory" of the tribal officials that was the basis for the challenge to the petitioners' eligibility for membership in the Tribe: that the ancestors of petitioners covered up "a supposed ancient family scandal involving the purported pregnancy and delivery at age eleven by their grandmother's and great-grandmother's minor sister, who had, by Foreman family memory and history, died childless. . . ." Petition, p. 6. This allegation, though incomprehensible and irrelevant to the present proceedings, was never made in petitioners' unverified petition for writ of mandate or any declaration filed with any of the three California state courts that have ruled on this case and was never included in any finding of fact. It was simply asserted in petitioners' petition for review to the California Supreme Court. Furthermore, no factual finding was ever made by any of those courts that the Tribal Council members would personally benefit from the reduced number of members sharing the benefits of Tribal membership, as asserted in the Petitioners' statement of the case. *Id.*

REASONS FOR DENYING THE PETITION

I.

THE ISSUES RAISED IN THE PETITION DO NOT FALL WITHIN THE COURT'S GUIDELINES FOR GRANTING A PETITION FOR WRIT OF CERTIORARI

Under Rule 10 of the United States Supreme Court's Rules of Court ("Rule 10"): "A petition for writ of certiorari will be granted only for compelling reasons." The legal issues raised by petitioners do not qualify under any of the criteria listed in Rule 10(a)-(c).

Of the criteria identified in Rule 10, only subdivisions (b) or (c) have any possible application to this appeal from a decision by a state court of last resort. Under Subdivision (b), this Court may grant a petition if: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Petitioners have cited to no decision of another state court of last resort or a United States court of appeals with which the decision of the Court of Appeal in this matter conflicts. To the extent that petitioners have cited to any conflict between court decisions in their "Reasons for Granting the Petition," Petitioners assert that the decision of the California Court of Appeal for the Third Appellate District is in conflict with the decision of the California Court of Appeal for the 4th Appellate District in *Turner v. Martire*, 82 Cal. App. 4th 1042 (CA 4 2000). Even if petitioners' assertion were correct, which it is not, this alleged conflict between appellate districts of California state courts does not qualify as a basis for granting a petition for writ of certiorari under Rule 10(b).

Petitioners' appeal also does not fall within the parameters of subdivision (c): "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The issue presented in petitioners' appeal was settled long ago by this Court in *Martinez* and *Bryan*, and the California Court of Appeal explicitly followed those rulings in reaching its decision in this case.

II.

THE ICRA AND THE TRIBE'S CONSTITUTION DO NOT PROVIDE PETITIONERS WITH A PRIVATE CIVIL CAUSE OF ACTION IN STATE COURT TO ENFORCE THEIR PROVISIONS AGAINST THE REDDING RANCHERIA TRIBAL COUNCIL

The present Petition addresses issues that were settled long ago by this Court in its decision in *Martinez*. In *Martinez*, female tribal members of the Santa Clara Pueblo in New Mexico filed a federal court action for injunctive and declaratory relief against the Tribe and its Governor, seeking to invalidate a provision of tribal law that made the children of male tribal members who married non-members eligible for membership in the Tribe, but not the children of female members who married non-members. The plaintiffs claimed that this tribal membership law violated their right to equal protection under the ICRA, 25 U.S.C. § 1302(8), by discriminating among tribal members on the basis of gender and national origin.

In its decision, this Court determined that the ICRA did not waive the Tribe's sovereign immunity. It concluded, therefore, that the Tribe's sovereign immunity barred the action against the Tribe. The Court stated, however, that the action might be permitted to proceed against the Governor under *Ex Parte Young*, if the plaintiffs had a right under the ICRA to enforce its provisions in federal court. The Court held, however, that the ICRA did not provide the plaintiffs with such a right. The Court concluded that the ICRA does not contain an express provision subjecting Indian tribes or their officials to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief, and that the authorization of the type of relief requested by the plaintiffs was not implicit in its terms. *Martinez*, 436 U.S.

59-60. The Court ruled that the exclusive private civil remedy available under the ICRA is a writ of habeas corpus in federal court. *Id.* at 66-67. *See* 25 U.S.C. § 1303.

Accordingly, despite the application of the doctrine in *Ex Parte Young*, this Court determined that federal courts lacked jurisdiction over the action, because the ICRA cannot be enforced, even against a tribal official, by a private civil action for injunctive or declaratory relief. *Id.*

The Court in *Martinez* identified two competing purposes in the ICRA: (1) to provide individual tribal members with some of the protections contained in the Bill of Rights; and (2) to promote the well-established federal policy of furthering Indian self-government. *Martinez*, 436 U.S. at 62.

The Court determined that, while the imposition of a federal cause of action to enforce the ICRA would promote the first policy, it would frustrate the second by undermining the authority of tribal forums and impose serious financial burdens on financially disadvantaged tribes. *Id.* at 64. The *Martinez* court concluded that the appropriate forums for ICRA claims were tribal forums:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obligated to apply. . . . Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. . . . Under these circumstances,

> we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for *habeas corpus* relief.

Id. at 65-66. (Citations omitted.)

While they do not state so specifically,[3] petitioners seem to suggest that the provisions of PL-280 create a private civil cause of action for injunctive relief to enforce the ICRA in state court against Indian tribes and tribal officials in PL-280 states. "Congress gave jurisdiction to the courts of California for suits between Indians. That grant of authority was not affected by the restriction, *in Federal Courts*, to habeas corpus as the sole relief available *in Federal Courts*." Petition, p. 9. (Emphasis original.)

The enactment of PL-280 predates the enactment of the ICRA by 15 years.[4] Clearly, PL-280 could not have created a private right of action to enforce an act that did not even exist when PL-280 was enacted. The exclusive remedy available under the ICRA is the right in 25 U.S.C. § 1303 to file a petition for a writ of *habeas corpus* in federal court. No state court remedies are identified in the ICRA, and the ICRA makes no reference of any kind to PL-280. Congress did not provide any remedy in federal or state courts, beyond a writ of *habeas corpus*

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[3] Petitioners do not clearly address the issue of whether PL-280 or the ICRA create a private cause of action. They do not, in fact, appear to recognize the difference between a grant of jurisdiction and the creation of a cause of action. The Tribe will, nevertheless, address both of these issues, as they are both essential to the analysis of whether California state courts can assert jurisdiction over the Tribe and the claims raised in this case.

[4] PL-280 was enacted in 1953. The ICRA was not enacted until 1968.

in federal court, because it wanted to strengthen tribal institutions of self-government by forcing tribal members to enforce the ICRA in tribal forums. *Martinez*, 436 U.S. at 62-68.

Moreover, PL-280 cannot be read to imply a cause of action to enforce the ICRA in state court for all of the reasons *Martinez* gave for refusing to find such a cause of action by implication in the ICRA itself:

> . . . providing a federal forum for issues arising under [25 U.S.C.] § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387- 388, 96 S. Ct. 943, 947, 47 L. Ed. 2d 106 (1976), may "undermine the authority of the tribal cour[t] . . . And hence . . . infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S., at 223, 79 S. Ct., at 272. [Footnote omitted.] *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. *Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this*

> *area cautions that we tread lightly in the absence of clear indications of legislative intent.*

Id. at 59. (Emphasis added.)

Like *Martinez*, the present case is an action for injunctive relief against tribal officials based on the claim that a tribal membership rule violates the due process-equal protection requirements in the ICRA. Clearly, neither the ICRA nor PL-280 provide petitioners with a private cause of action to enforce their due process claims.

For the same reasons, the Tribe's Constitution, which incorporated the rights enumerated in 25 U.S.C. § 1302 by reference, did not create a private civil action to enforce its provisions in state court. The court of appeal examined the relevant provisions of the Constitution and found no language that could be construed as authorizing such an action in state court. *Ackerman*, 121 Cal.App.4th at 955, Appendix, pp. 12a-13a. Moreover, an interpretation of the Tribe's Constitution is not an issue that could ever warrant review in this court under the criteria set forth in Sup. Ct. R. 10.

III.

PL-280 DOES NOT GRANT CALIFORNIA COURTS JURISDICTION OVER THIS LAWSUIT

While the absence of a private right of action to enforce the provisions of the ICRA under either the ICRA or PL-280 is sufficient grounds to deny the Petition, the Tribe will now demonstrate that petitioners' arguments concerning jurisdiction under PL-280 are also entirely meritless.

In support of their Petition, Petitioners advance a second untenable reading of PL-280. Petitioners assert that PL-280 grants jurisdiction over Indian tribes and tribal officials to California state courts.

Petitioners argue, without citation to any supporting authority, that tribal forums may be the exclusive remedy in most states, but in California and other PL-280 states, Congress provided a remedy to enforce the ICRA in state court. "In California tribes, the Courts of California are the Courts designated by Congress by PL-280 to adjudicate disputes between Indians and to protect individual Indians utilizing their own Constitutions and the ICRA." Petition, p. 19. They do not identify any express language in 25 U.S.C. § 1360 to support this contention. They point to no legislative history that supports this interpretation of the statute.

There is absolutely no basis for petitioners' interpretation. 25 U.S.C. § 1360(a) provides, in pertinent part: "[California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties[.]" Nothing in the plain language of PL-280 grants jurisdiction over Indian tribes, and petitioners' interpretation of PL-280 was unequivocally rejected by this Court in *Bryan*. There, the Court explicitly denied that PL-280 confers jurisdiction over the tribes themselves: "The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves." *Bryan*, 426 U.S. at 388-389. The court of appeal pointed out that California courts are in accord with this conclusion *Ackerman*, 121 Cal.App.4th at 954, Appendix, p. 11a, citing *Long v. Chemehuevi Indian Reservation*, 115 Cal.App. 3d 853, 857 (1981). "No case has been cited to us, and we have found none, which concludes or even suggests, that 28 United States Code Section 1360 conferred jurisdiction over the Indian tribes, as contrasted with individual Indian members of the Tribes."

As the court of appeal noted, petitioners argument is based "on very tenuous reasoning." *Ackerman*, 121 Cal.App.4th at 953, Appendix, p. 10a. Petitioners' argument:

> turns *Santa Clara Pueblo [v. Martinez]* on its head. The Supreme Court discussed only tribal courts and nonjudicial tribal institutions as possessing jurisdiction over tribal matters. The Supreme Court did not leave jurisdiction open to 'courts' in general or state courts in particular. The Supreme Court carefully explained its rationale for leaving disputes over the ICRA to tribal courts and institutions. This rationale does not support any conferral of jurisdiction on state courts.

Id. at 953-954, Appendix, p. 10a.

Petitioners' reading of PL-280, furthermore, is inconsistent with the applicable rules of statutory construction. Any ambiguities in statutes passed for the benefit of Indians are to be construed in favor of the Indians. *See Bryan*; *Northern Cheyenne v. Hollowbreast*, 415 U.S. 649, 655 fn.7 (1976); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 583 (1832); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975).

Federal courts of appeal have specifically applied this canon of construction where a statute is silent as to its application to Indian tribes. Recently, in *Artichoke Joe's v. Norton* 353 F.3d 712, 729, fn. 15 (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit stated: "a federal statute silent as to its applicability to Indian tribes will not be found to intrude on a tribe's right to self-governance in purely intramural affairs." In *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1082 (9th Cir. 2001), the Court specifically refused to find that a statute granted jurisdiction over an Indian tribe where the statute

was silent as to its application to tribes (discussing the Age Discrimination in Employment Act of 1967).

At a minimum, PL-280 is silent as to its applicability to civil actions to enforce the ICRA and to actions by tribal members against their tribe or tribal officials acting in their official capacity. To construe this silence as granting California courts jurisdiction over petitioners' action would ". . . intrude on the Tribe's right to self-governance in purely intramural affairs." *Artichoke Joe's v. Norton* 353 F.3d at 729.

Finally, Petitioners argue that a narrow reading of PL-280 deprives them of any forum to adjudicate their due process claim. If jurisdiction were not granted to state courts by PL-280, they assert "Indian tribes in the State of California . . . would be able to institute much mischief and unconstitutional abuses for which habeas relief is inadequate or unavailable without necessary and appropriate remedy from this or any court." Petition, p. 9. This is patently untrue. Petitioners had available to them a *tribal* forum for the resolution of this purely internal tribal issue. Under the very resolution petitioners challenged, a hearing officer is appointed to preside over a formal hearing on the reconsideration of eligibility. The hearing officer must be an impartial and experienced attorney, who is empowered to rule on issues of law. *Ackerman*, 121 Cal.App.4th at 950, Appendix, pp. 4a-5a. At the time of the trial court's decision, petitioners and the Tribal Council had agreed to a briefing schedule for presenting petitioners due process claims to the hearing officer for a decision. C.T. 72, &22.

Rather than demonstrating that if PL-280 is limited to its express wording, petitioners will be deprived of a remedy, this case actually demonstrates precisely how the process was intended to work under *Martinez* and related decisions. At the

same time, this case reveals how those tribal institutions would be undermined if PL-280 were read to give state courts jurisdiction over a private civil action to enforce the ICRA or the Tribe's Constitution.

IV.

THE DECISION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH ANY OF THE DECISIONS CITED OR DISCUSSED BY PETITIONERS IN THEIR PETITION.

In the foregoing section, the Tribe demonstrated that this Court, in *Martinez*, found that *Ex Parte Young* cannot be used as a basis for asserting jurisdiction over ICRA claims. Petitioners, nevertheless, claim that the court of appeal's rejection of their *Ex Parte Young* claim conflicts with the decision of the Fourth Appellate District in *Turner.* They base that contention on a quote from *Turner* stating that a tribal official is not protected by tribal sovereign immunity where he or she is not acting within the scope of his or her authority:

> Where an officer of a sovereign acts beyond his or her delegated authority, his or her actions "are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." . . . Therefore, immunity does not attach to such conduct.

Turner, 82 Cal.App.4th at 1055.

As the following discussion will demonstrate, however, the decision in *Turner* does not apply to the present case, and even if it did, the respondents in this case would be protected by tribal sovereign immunity under the standard enunciated in *Turner*.

In *Turner,* plaintiff union organizers filed suit against two tribal law enforcement officials, who were not tribal members, claiming that they had been assaulted by the defendants in response to their unionizing activities. The trial court granted defendants' motion to quash service of summons on the ground that the suit against the individual defendants was barred by the Tribe's sovereign immunity. The court of appeal reversed, ruling that, before the defendants could rely on the tribe's sovereign immunity, they must prove that: (1) they were tribal officials who exercise policy making authority on behalf of the tribe, *Turner*, 82 Cal.App.4th at 1048-1049; and (2) they were acting within the authority delegated to them by the Tribe. *Id.* at 1048-1049.

Fundamentally, the *Turner* decision is not applicable to the present case. Unlike the claims for injunctive and declaratory relief at issue in this case, *Turner* involved the application of tribal sovereign immunity in the context of an action for money damages. The *Turner* court made it clear that acting outside the scope of authority does not mean conduct that violates federal or tribal law, but rather conduct that is outside the official duties delegated to the official under tribal law:[5]

> Tortious acts are not necessarily exempt from immunity. (*Boisclair[v. Superior Court* (1990)], *supra*, 51 Cal.3d 1140, 1157.) Here, however,

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[5] This view is consistent with *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.* 221 F. Supp. 2d 271, 276. (D. Conn. 2002).

> defendants produced no evidence as to the *scope of their authority as tribal law enforcement officers*. In particular, the *record does not indicate whether defendants were authorized to use force or to detain or arrest visitors*, and, if so, under what circumstances. (*See Suarez v. Newquist, supra*, 70 Wn. App. 827, 831- 832 [855 P.2d 1200, 1203-1204] [tribal police officer had authority to transport, though not to arrest, nonmember of tribe].) *Absent such evidence, there was no basis for concluding defendants acted within the scope of their authority for purposes of immunity*.

Id. at 1055. (Emphasis added.)

In this case, under *Martinez,* the state court has no jurisdiction, because there is no private right of action to enforce the ICRA or the Tribe's Constitution in state court. But even if there existed a private right of action, the facts in this case clearly establish that the respondents would be protected by tribal sovereign immunity under the standard set forth in *Turner*. In this case, unlike in *Turner*, it is undisputed that respondents were both exercising the policy making authority of the Tribe and were exercising authority expressly delegated to them by the Tribe's Constitution. The respondent Tribal Council members are the highest ranking officials in the Tribe, who were exercising the authority specifically delegated to them by the Tribe's Constitution to adopt rules governing enrollment in the Tribe. Under the reasoning of *Turner,* the respondents enjoy the sovereign immunity of the Tribe.

Accordingly, the court of appeal's decision is entirely consistent with the decision in *Turner*.

Petitioners also contend that the court of appeals decision is inconsistent with the discussion of PL-280 and the ICRA in *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998) ("*Wadena*"). This contention is incorrect.

In *Wadena,* the defendants were charged, under 18 U.S.C. § 241, with conspiring to deny a number of tribal members the enjoyment of a right secured by the laws of the United States, the right to vote. The United States alleged that voting rights were secured to the members of the tribe in that case by the ICRA. Case law had so held. The defendants argued that these cases were overruled by *Martinez*. They maintained that the federal government could not prosecute under Section 241 for a deprivation of a right secured by the ICRA, because the ICRA did not imply a private cause of action to enforce its provisions.

The Eighth Circuit rejected that argument. It made the obvious observation that the federal government was not relying on an implied right to enforce the ICRA, it was prosecuting a violation of 18 U.S.C. § 241. The court listed four reasons why *Martinez* did not bar the federal government from prosecuting this criminal violation. *Wadena*, 152 F.3d at 845-846. All of those reasons distinguished *Martinez* on the basis that *Martinez* involved a private civil action to challenge a tribal law enacted by a tribe's governing body (as in this case), whereas *Wadena* was a criminal prosecution based on the criminal misconduct of specific individuals. The court recognized that the *Martinez* decision appropriately concluded that Congress did not intend the ICRA to authorize private civil actions against laws adopted by tribes, as distinguished from a criminal prosecution under independent authority of criminal misconduct by individuals who also happened to be tribal officials, stating:

> . . . the threat to tribal sovereignty is great [in a private civil action challenging a tribal law] because a federal

> court would be asked to sit in judgment of legislation enacted by a legitimate tribal government. In this case, the question is whether jurisdiction can be asserted over the illegitimate criminal action of fraud in a tribal election.

Wadena, 152 F.3d at 846.

Under the analysis set forth by the Eighth Circuit, the case before this Court is precisely the type of case over which Congress did not intend to grant non-tribal forums jurisdiction.

Petitioners also contend that *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2002), contradicts the court of appeal's decision. It does not.

In *Dawavendewa*, plaintiff was a member of the Hopi Tribe who applied for a job with Salt River Project Agricultural Improvement and Power District, which leased property on the Navajo Indian Reservation from the Navajo Tribe. *Id.* at 1153. Under the lease, the District was required to follow a Navajo employment policy that provided a preference for members of the Navajo Tribe over others, including members of other Indian tribes, such as the Hopi. Dawavendewa challenged the policy on the grounds that it violated Title VII of the Federal Civil Rights Act.

The district court dismissed the action against the District on the grounds that the Navajo Tribe was a necessary and indispensable party to the action, which could not be joined because of its tribal sovereign immunity. *Id.* Before the Ninth Circuit, Dawavendewa argued that sovereign immunity did not bar his action, because he could name individual tribal officials

in lieu of the Tribe, and, under *Ex Parte Young*, the tribe's sovereign immunity would not bar the action against the tribal officials. The Ninth Circuit rejected that argument and affirmed the district court's ruling.[6]

Dawavendewa does not conflict with the court of appeal decision in this case for two reasons. First, *Dawavendewa* does not address the ICRA or PL-280, and it has no direct bearing on the court of appeal's decision, which was concerned primarily with the holding in *Martinez* that the ICRA does not include a private right of enforcement, even against tribal officials who could be sued under an *Ex Parte Young* theory. Second, although the Ninth Circuit analyzed the possible application of *Ex Parte Young* in *Dawavendewa*, the Ninth Circuit rejected Dawavendewa's argument. The Ninth Circuit viewed Dawavendewa's argument as an end run around the Navajo Nation's sovereign immunity, relying on its earlier decision in *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992),[7] stating:

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[6] Dawavendewa relied on two Ninth Circuit decisions which, like *Martinez,* had held that *Ex Parte Young* could apply to tribal officials who were enforcing a tribal law that violated federal law, *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir.1991), and *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.1996). *Id.* at 1159. As is discussed below, the Ninth Circuit rejected the application of those cases to the facts in *Dawavendewa*.

[7] *Shermoen* involved an action against the United States challenging the Yurok-Hoopa Settlement Act. When the United States moved to dismiss the complaint in that case on the grounds that the Hoopa Tribe was a necessary and indispensable party, which could not be joined because of its sovereign immunity, the plaintiffs attempted to file an amended complaint naming the individual members of the Hoopa Valley Tribe's governing council as defendants.

> As in *Aspaas* and *Blackfeet Tribe,* we have permitted suits against officials when it is alleged that those officials acted beyond their authority in contravention of constitutional or federal statutory law. Nevertheless, as recognized in *Shermoen,* a suit may be barred, even if the officer being sued has acted unconstitutionally or beyond his statutory powers, when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property.

The Ninth Circuit's reasons for rejecting Dawavendewa's argument apply equally well to this case. Here, the petitioners have named the individual members of the Tribal Council as an end run around the Tribe's sovereign immunity. Respondent Council members were named solely because they sit on the Tribal Council, not because of their individual conduct in voting for or against the resolution: all seven members were named even though three of them voted against the resolution. C.T. 5. Plaintiffs seek relief that will require affirmative action by the sovereign, since the Tribe can only enact, amend or repeal tribal laws at meetings of its Tribal Council at which the individual council members exercise their right to vote.

Finally, the petitioners rely on tribal court decisions which have permitted actions to enforce the ICRA in tribal court under an *Ex Parte Young* theory. *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian Law Rptr. 6045 (Cheyenne River Tribal Court of Appeals 1996); *Terry Carpenter et al. v. Las Vegas Paiute Tribe*, 29 Indian Law Rptr. 6041 (Court of Appeals, Las Vegas Paiute Tribe 2002); and *Ft. Peck Sioux Council v. Ft. Peck Tribes,* (no citation provided). Petition, pp. 18-20, Appendix F. Of course, actions to enforce the ICRA in tribal court are precisely what the

Martinez decision envisioned. They have no bearing on the jurisdiction of California state courts under PL-280.

CONCLUSION

Petitioners have not raised any issue that meets the criteria for Supreme Court review under Rule 10. The issues raised in the Petition are not the subject of conflicting decisions among federal courts of appeal, between the highest court of any state and any district court or between the highest courts of any states. The issues are also not an important issue that needs to be settled by this Court, as this area of the law is well settled.

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. . . . Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." . . . They have the power to make their own substantive law in internal matters, . . . and to enforce that law in their own forums. . .

Martinez, 436 U.S. at 55-56. (Citations omitted.)

Tribal membership is among the most sensitive of those internal matters. They are to be decided in forums created by the tribes themselves.

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. . . . Given the often vast gulf between tribal traditions and those with which federal courts are more intimately

> familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Id. at 72, fn 32.

Petitioners obviously desire the benefits of tribal membership without subjecting themselves to the decision-making authority of the Tribe. Members of the Tribe are subject to the jurisdiction of the Tribe. Nevertheless, petitioners want to reserve the right to go to state court whenever they disagree with a decision of their tribal government. Tribal membership comes with benefits and with obligations. Petitioners must be willing to accept both. At a minimum, this should include the obligation to exhaust tribal remedies before seeking relief from a state or federal court.

For all of the foregoing reasons, the Respondent Redding Rancheria respectfully requests that Petitioners Lorena Ackerman et al's petition for writ of certiorari be denied.

Respectfully submitted,

DAVID J. RAPPORT
RAPPORT & MARSTON
405 W. Perkins Street
P.O. Box 488
Ukiah, CA 95482
(707) 462-6846

Attorneys for Respondents